

“You Can Observe a Lot by Just Watching”:¹ A Perspective on the Contributions of Judge Andy Hurwitz

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For this edition of the *Arizona State Law Journal (Journal)*, the editors have invited prominent Arizona judges (both state and federal) to write on topics they know about. All of the authors are jurists of experience and insight. Their articles range from soup to nuts, all of them interesting and relevant to practitioners and academics alike. The result is something most unique—a practical, useful, and interesting issue of a law review that, at the same time, recognizes some of the members of Arizona’s outstanding judiciary.

The *Journal* has chosen to kick off this issue by paying particular tribute to one of those judges—Ninth Circuit Judge and former Arizona Supreme Court Justice Andrew D. Hurwitz. Judge Hurwitz is approaching the twentieth anniversary of his appointment to the Arizona Supreme Court and his tenth anniversary as a member of the Ninth Circuit Court of Appeals. But his contributions to Arizona, and to its legal community, go back much further than that.

Andy arrived in Arizona (already an expert in Arizona law³) in 1974 just after completing a clerkship with Supreme Court Justice Potter Stewart.⁴ Phoenix was small then. Andy and the other lawyers at the start-up firm he joined took work that would allow them to learn how to try (and appeal) cases and to provide good representation to those who might not otherwise afford

1. Attributed to Yogi Berra, a favorite philosopher of the subject of this tribute. Michele Gorman, *Yogi Berra’s Most Memorable Sayings*, NEWSWEEK (Sept. 23, 2015, 2:04 PM), <https://www.newsweek.com/most-memorable-yogi-isms-375661> [https://perma.cc/CMH3-CFC5]. Yogi has even made it into Judge Hurwitz’s opinions. *See, e.g., Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (“The great Yankee catcher Yogi Berra is reputed (likely apocryphally) to have said that it’s ‘tough to make predictions, especially about the future.’”).

2. Chief Judge, United States District Court for the District of Arizona. The author thanks the Hon. Diane M. Johnsen (ret.) and Luci Davis for their valuable editorial and anecdotal assistance.

3. It is true he finished first on the Arizona bar exam even though the only studying he did was on the flight out here.

4. *The Hon. Andrew David Hurwitz*, AM. L. INST., <https://www.ali.org/members/member/231675/> [https://perma.cc/4BTZ-CEL5].

it. The established legal community was welcoming, and good work was quickly recognized. Andy was arguing before the Arizona Supreme Court less than a year after he arrived.⁵

It took him just a little longer to crack the teaching ranks. In 1977, after three years of trying, he convinced then Dean Willard Pedrick to take him on as an Adjunct Professor at the Arizona State University Sandra Day O'Connor College of Law (ASU Law). He's still there, currently teaching federal courts.⁶ According to former Dean Douglas Sylvester, Andy is the longest continuously serving faculty member of any kind at ASU Law.

Andy's political acumen also was quickly recognized. As a young man, he served four years, from 1980 to 1983, as chief of staff for Governor Bruce Babbitt.⁷ He also was the chief of staff for Rose Mofford in 1988 when she became governor upon the impeachment of Evan Mecham.⁸ He served on the Arizona Board of Regents from 1988 to 1996 (and was its President from 1992 to 1993), and co-chaired Janet Napolitano's transition team in 2002.⁹

In private practice, Andy was brilliant. Anybody who saw him practice has stories about him. I have a number. Once, in an administrative hearing challenging a multimillion-dollar contract award to Andy's client, Andy had to cross-examine an East-Coast accounting expert who was challenging the agency's tabulations. The expert's credentials were impressive. Among other things, he had finished first on the national CPA exam. Back then, there was no mandatory prior disclosure of expert opinions. So Andy first heard this expert's complex and detailed theory (together with charts, bells, and whistles) when the expert gave his direct examination at the hearing. (And oh—more pressure: the expert had to fly home that same night, so Andy had no time to mull over the expert's testimony before commencing the cross-examination.) No problem for Andy. On the spot, he constructed and executed a cross-examination that eviscerated the expert's testimony and demonstrated that it actually supported the agency award. I have never seen anything like it.

5. See *Banta v. Super. Ct.*, 544 P.2d 653, 653 (Ariz. 1976).

6. Sandra Day O'Connor Coll. of L., *Federal Courts*, ARIZ. ST. UNIV., https://apps.law.asu.edu/Apps/Registrar/CourseInfo/CourseDescriptions.aspx?Course_ID=6428 [<https://perma.cc/R5LH-TMQ5>].

7. *Tiger of the Week: Andrew Hurwitz '68*, PRINCETON ALUMNI WKLY. (Nov. 16, 2011), <https://paw.princeton.edu/article/tiger-week-andrew-hurwitz-68> [<https://perma.cc/XMB7-7Q3G>].

8. See AM. L. INST., *supra* note 4.

9. Howard Fischer, *Four on Short List for Arizona Supreme Court*, ARIZ. DAILY SUN (Jan. 17, 2003), https://azdailysun.com/four-on-short-list-for-arizona-supreme-court/article_e69cb7d3-d1b2-54bc-a537-d7c78290bf52.html [<https://perma.cc/UR4K-WLRM>].

Although Andy was a brilliant trial lawyer, it was as an appellate attorney that he gained a national reputation. He is probably best known for successfully arguing *Ring v. Arizona* in the U.S. Supreme Court against his friend Janet Napolitano.¹⁰ She apparently didn't bear a grudge. The next year, she appointed Andy to the Arizona Supreme Court.¹¹

Justice Hurwitz often arrived at creative and flexible solutions, both by textual interpretation and through development of the common law. In *Turken v. Gordon*, for example, he clarified the interpretation of the "Gift Clause" in the Arizona Constitution. He then persuaded his colleagues to take the unusual step of giving that clarification only future effect (not even applying it to the case at bar) because the Court's previous pronouncements were unclear and might have been relied upon by the municipal defendants.¹² Or, consider *Lofts at Fillmore Condominium Ass'n v. Reliance Commercial Construction, Inc.*, in which he ruled that a homebuilder's implied warranty extends to successive home purchasers.¹³

After almost ten years, Andy traded his title as Arizona Supreme Court Justice for that of a Judge on the Ninth Circuit.¹⁴ The Ninth Circuit, of course, has a much broader jurisdiction. But while the Arizona Supreme Court has final say on matters of Arizona law, the Ninth Circuit, of course, does not have the final say on federal law. Nor do federal courts create much common law. Judge Hurwitz therefore cannot be as creative as Justice Hurwitz could. Nevertheless, his talents are well-suited to the Ninth Circuit. He has a clear and well-reasoned view of what the law is and should be in any given situation, and he understands the value of consensus and clarity, and the legitimacy that those elements bestow on judge-made law. Some would say that if there's any court on which consensus must be illusive, it would be the Ninth Circuit. It is made up of twenty-nine active judges and eighteen senior judges and is perceived to be sharply divided by judicial ideologies.¹⁵

But the talents and disposition that made him so valuable in the Governor's Office and on the Board of Regents serve Judge Hurwitz well on the Ninth Circuit. There, he succeeds because, remarkably, he genuinely likes

10. 536 U.S. 584 (2002).

11. AM. L. INST., *supra* note 4.

12. 224 P.3d 158, 168 (Ariz. 2010).

13. 190 P.3d 733, 736 (Ariz. 2008).

14. Press Release, Pub. Info. Off., U.S. Cts. for the Ninth Cir., Senate Confirms Arizona Justice Andrew D. Hurwitz to Ninth Circuit Court of Appeals (June 12, 2012), https://cdn.ca9.uscourts.gov/datastore/uploads/ce9/476-Hurwitz_Confirmed.pdf [<https://perma.cc/3BW2-L68J>].

15. See Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 Loy. L.A. L. Rev. 1, 2-3 (2003) ("[P]eople often forget that, for every liberal on the Ninth Circuit, there is a judge who occupies the exact opposite place on the ideological continuum.").

and thinks the best of people—even, and perhaps especially, those colleagues with whom he does not agree. Nor does Judge Hurwitz sweat the small stuff. He has no need to author an opinion. Responding to his colleagues' draft decisions, he offers tactful and excellent suggestions that, I am told, prove to be very influential. He recognizes when a case before another panel is the better case in which to address or announce a needed legal principle, and he recognizes the difference between an opinion and a memorandum disposition. At the same time, he understands that jurists of good faith, principled intellect, and integrity may decide difficult cases differently, and when he dissents, or responds to dissents, he does so with civility.

One of the reasons Judge Hurwitz is such an effective jurist is that, as his colleague Senior Ninth Circuit Judge Mike Hawkins observes, "Andy is always teaching: whether he's in conference, teaching at the law school, or eating lunch." I've eaten a few lunches with Judge Hurwitz, and I can tell you that Judge Hawkins is right.

Andy was a marvelous teacher and mentor to the young lawyers at his law firm, where his office was the site of daily vigorous discussions that produced thoughtful, well-reasoned legal briefs and carefully designed trial strategies. Many of those of us who trained with him now sit on the bench. Now, of course, his law clerks are his every-day students, and what a wonderful experience that must be for them. His chambers have twice-daily meetings, in which, in the words of a former clerk, Judge Hurwitz "models and teaches how to rigorously analyze complex legal and factual issues, and leaves you with a strong impression of how judges think (or ought to think)." Another clerk reports, "His dedication to the craft of writing is remarkable. As a clerk I might start an average workday by sending him version fourteen of a draft; the same day might end with Judge Hurwitz's sending version twenty-three back to me." And, by the way, Judge Hurwitz is not afraid of the views of his own law clerks. He does not hire only those who share his worldview. All kinds of young lawyers—with all different views—have been Judge Hurwitz's clerks, and he likes and is loyal to every last one of them.

His mentoring does not just extend to his clerks or young colleagues. As an advocate, Andy always viewed it as a real service when the bench was hot, peppering him and his adversary with questions that would reveal the issues on which, as far as the judges were concerned, the case would turn. That is why anyone appearing before Judge Hurwitz can expect the same courtesy—even if he's the only one on the panel asking the questions.

Those who will look for an agenda or theme behind Judge Hurwitz's jurisprudence will for the most part be disappointed. Indeed, surprisingly to some, his opinions are marked by judicial restraint and respect for other branches of government—a respect likely borne out of his previous

governmental experience.¹⁶ He also is an unceasingly diligent protector of constitutional rights.¹⁷ What you get in every case with Judge Hurwitz is dedication to the rule of law, no judicial agenda.

Judge Hurwitz's professional life cannot be separated from his personal life. He has been married to Dr. Sally Hurwitz, now retired from ASU's education faculty, for fifty-three years. Like Andy, Sally is a keen observer, has a great wit, and is a lot of fun. She and Andy each make up part of the other. They have two sons—one a business executive in Portland and one a teacher in Phoenix—and a daughter who is a presence on the local art scene, whose imaginative work is featured in Andy's and his colleagues' chambers. Most importantly, however, Sally and Andy have three grandchildren who are the pride of their lives and the apples of their eyes.

Andy is a voracious reader, a bicyclist, a swimmer, and a sports fan (especially baseball). Most particularly, Andy is a social person and a devoted friend for whom long-standing friendships are among life's greatest treasures. Not long ago, I was talking to him about perhaps his dearest friend, then hospitalized with a terminal illness. Andy told me that if someone had told him in the beginning that he and the friend could have forty-five years of a wonderful and deep association, but when it ended, his heart would be broken, he had no doubt that he would have chosen the friendship. But now, at the end, his heart was truly broken.

James Madison sometimes referred to the Constitution as only "a parchment barrier."¹⁸ He wanted to make the point that words on paper can do nothing to quell an incited majority unless there are, incorporated into the hearts and minds of the people as a whole, the principles that are the foundation upon which the Constitution is built. Such has been Judge Hurwitz's work. In the course of it, he has shown a long list of us how to be better lawyers, better writers, better thinkers, better friends, better people. I'm grateful to be on that list.

16. See, e.g., *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (holding that no matter how well-merited, it is not within the realm of judicial power to order the executive branch to develop a plan to combat climate change); *Kromko v. Ariz. Bd. of Regents*, 165 P.3d 168 (Ariz. 2007) (holding that the Arizona Constitution's mandate that secondary education be "as nearly free as possible" is beyond appropriate judicial inquiry and must be implemented by the Board of Regents).

17. See, e.g., *Obsidian Fin. Grp. v. Cox*, 740 F.3d 1284 (9th Cir. 2014) (extending First Amendment protections to bloggers); *Citizen Publ'g Co. v. Miller*, 115 P.3d 107 (Ariz. 2005) (holding that a newspaper's publication of a letter to the editor advocating violence against Muslims was speech protected by the First Amendment); *State v. VanWinkle*, 273 P.3d 1148 (Ariz. 2012) (holding that comment on a defendant's post-custody, pre-Miranda silence violates his right against self-incrimination); *Mario W. v. Kaipio*, 281 P.3d 476 (Ariz. 2012) (limiting the extent to which juveniles charged with certain offenses can be required to provide DNA samples).

18. See, e.g., THE FEDERALIST NO. 48 (James Madison).